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for The Defense

The Training Newsletter of the Maricopa County Public Defender's Office

Dean Trebesch, Maricopa County Public Defender

VICTIM IMPACT IN CAPITAL CASES: PANDORA'S BOX NOW OPEN

By Roland J. Steinle, III
Deputy Legal Defender

On April 29, 1999, A.R.S. §13-703(C) was amended to permit victim impact evidence. The change reads:

> In evaluating mitigating circumstances, the court shall consider any information presented by the victim regarding the murdered person and the impact of the murder on the victim and other family members. The court shall not consider any recommendation made by the victim regarding the sentence to be imposed. A victim may submit a written impact statement, an audio or video tape statement or make an oral impact statement to the probation officer preparing the presentence report. The probation officer shall consider and include in the presentence report the victim impact information regarding the murdered person and the economical, physical and psychological impact of the murder on the victim and other family members. The victim has the right to be present and to testify at the

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A SUMMARY OF CIVIL COURT ORDERED EVALUATION AND TREATMENT AFTER RULE 11

By Mary Miller
Division Chief – Mental Health

The court determined your mentally ill client was incompetent to stand trial, and as soon as you received the final minute entry you closed the file. What happened to your client?

If a court found reasonable cause to believe that your client was a danger to self, a danger to others, persistently and acutely disabled, or gravely disabled as a result of a mental disorder pursuant to A.R.S. § 36-501 et seq., your client may have been ordered to undergo a civil process called Court Ordered Evaluation and Treatment. This process, formerly called Civil Commitment, is the means by which the state seeks legal permission to treat someone for mental illness when that person cannot or will not give consent to be treated.

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for The Defense

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> sentencing hearing. The victim may present information about the murdered person and the impact of the murder on the victim and other family members.

The amendment opens the door to evidence of physical, emotional, and psychological impact of the murder on the victim and the other family members. Nowhere, however, does it discuss what is proper impact evidence, the burden of proof, or whether the Rules of Evidence apply when the state introduces it. Thus, the legislature has opened up "Pandora's Box." With this amendment it would appear that the legislature is finally filling the gap after the Supreme Court found that the Eighth Amendment erects no *per se* barriers to this kind of evidence in *Payne v. Tennessee*.[1] However, the method that they chose to use creates constitutional problems which were not addressed in *Payne*.

In *Payne*, the evidence of victim impact was admitted in rebuttal to evidence presented by the defense including the fact Payne was a churchgoing person who did not drink and cared for children, thereby showing the crimes were inconsistent with his character. Further, the prosecutor used it to bolster his argument why the crime was especially cruel, heinous, and atrocious or, in other words, why he had proven one of the aggravating factors. It was not admitted pursuant to a statute or a rule. The Tennessee Supreme Court found it to be "technically irrelevant" but concluded it was harmless error. The U.S. Supreme Court affirmed, finding that the Eighth Amendment does not erect any *per se* barriers to this evidence.

Under the legislative amendments, rather than just say that the court could consider this evidence, they chose to wrap it around the court's specific consideration of mitigating circumstances. In so doing, they created problems of constitutional dimensions. Before looking at the problems, one must first look at the way the court viewed this evidence after the *Payne* decision. Victim impact information was not relevant to any aggravating factor and therefore legally inadmissible. In *State v. Bolton*,[2] the court stated:

> Defendant argues that admission of these statements violated his right to due process of law and his right against infliction of cruel and unusual punishment. We acknowledge that family testimony concerning the appropriate sentence may violate the Constitution if presented to a capital sentencing jury. See, Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). We also acknowledge that victim impact testimony is not relevant to any of our statutory aggravating factors. Atwood, 171 Ariz. at 656, 832 P.2d at 673.

These principles were reaffirmed in *State v. Williams*.[3] It is clear from these cases that the court took the same approach that the Tennessee Supreme Court did. In both cases, the court did not reverse the sentencing, nor did the court remand for further re-sentencing. In *Williams*, then Chief Justice Feldman specially concurring made the following comments:

> I believe the time is near for the court to take a position forbidding the introduction of evidence calculated to influence the sentencing judge in a manner forbidden by the law. It should not be offered by the prosecution or permitted by the court.[4]

Interpreting the Statute

The legislature, in its amendment, has sought to create a rule of evidence to allow impact evidence when the court considers mitigating circumstances. Obviously the legislature still believes it is not relevant on any aggravating circumstances. It certainly could have said "in considering aggravating circumstances." The legislature could have created a new aggravating factor similar to A.R.S. § 13-702(C)(9).[5] The legislature could have used language which stated the court generally should consider it similar to the provisions of A.R.S. § 13-702(E).[6] However, the legislature stated that the only place where the court is to consider it is in evaluating [weighing] mitigating circumstances. The amendment is silent on what weight the court should give to this evidence and it does not tell the court how it is to evaluate [weigh] it. Is the legislature suggesting that the court not give weight to legitimate statutory mitigating circumstances in a particular case because of the emotional and financial impact of the murder on the family of the victim? What then happens to nonstatutory mitigating circumstances? If that is the case, it violates the very strict requirements of *Lockett v. Ohio*,[7] and *Eddings v. Oklahoma*.[8] These cases make it clear that there can be no modifiers of the obligation of the court to listen to and give weight to mitigating circumstances.

Even before this amendment, when a trial court was weighing the mitigation there was an argument that the Arizona death penalty process may have been defective by precluding the sentencer [the trial judge] from considering circumstances that may be mitigating yet fail to meet the burden of proof imposed on a defendant. This precludes the sentencing court from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death. There is a lengthy discussion concerning this issue in *Adamson v. Ricketts*.[9] The court, in *Adamson*,

found that this exclusion of relevant evidence at the weighing stage violates the principle established by *Lockett, and Eddings*: a sentencing court must weigh all relevant mitigating evidence against the aggravating circumstances.

Any modifiers which restrict the trier of fact from consideration of any mitigation are unconstitutional. *Penry v. Lynaugh.*[10] In *Penry*, the defense asked for a jury instruction

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which would have allowed the jury to consider the mental retardation of the defendant. When the trial court refused the instruction, the Court concluded that it could not be sure the jury was able to give effect to the mitigating evidence of mental retardation. In doing so the court stated:

> Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "reasoned moral response to the defendant's background, character, and crime."

The issue then becomes: does the amendment to 703(C) create a modifier which precludes the sentencer from giving consideration and weight to what would otherwise be relevant mitigating evidence or does 703(C) reduce the weight that the court might otherwise give mitigating evidence? Clearly, this victim impact evidence does not fit the traditional definitions of a mitigating circumstance.

Defining Mitigating Circumstances

In order to begin the analysis, one must first look at what is a mitigating circumstance. A.R.S. § 13-703 (G) provides:

> G. Mitigating circumstances shall be any factors proffered by the defendant or the State which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense….

The following definition of mitigation is what has been used to instruct juries in North Carolina, Mississippi, and California:

> Mitigating circumstances are not intended as a justification or excuse for a killing or to reduce it to a lesser degree of crime than first degree murder. Instead, a mitigating circumstance is a fact or group of facts which has one of two purposes: (1) a mitigating circumstance may extenuate or reduce the moral culpability of this defendant for this crime, or (2) a mitigating circumstance may make the defendant less deserving of the extreme punishment of death. Our law requires consideration of more than just the bare facts of the crime. A mitigating circumstance may stem from any of the diverse frailties of humankind. In considering mitigating circumstances, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's background, character, age, education, environment, behavior and habits which make him less deserving of the extreme punishment of death. You may consider as a mitigating circumstance any circumstance which tends to justify the penalty of life imprisonment or that the defendant contends as a basis for a sentence less than death.

Clearly, victim impact information would not be relevant under this definition. If relevant evidence is evidence which has a tendency to make the existence of any fact [statutory or nonstatutory mitigating fact] that is of consequence to the determination [whether to impose death] more or less probable, then it is not relevant on mitigating circumstances. In other words, how would victim impact make a defendant's age under G(5) more probable or less probable? It could only be used to reduce the weight that the court might give to this factor. The same could be said with regard to "significantly impaired" under G(1). Its impact is only offered to show the "victim is an individual whose death represents a unique loss to society and in particular to his family" *Payne*.[11] It is highly emotional and it serves no relevant purpose other than to appeal to the sympathies or emotions of the judge, as pointed out by Justice Feldman in the *Williams* case. It cre-

(Continued from page 3)
ates a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[12] Here, the amendment in 703(C) undercuts the mitigation offered by the defendant and/or it is a pure appeal to passion. Either way, it leads to arbitrary, freakish, wanton, and inconsistent results which violate the Eighth and Fourteenth Amendment to the United States Constitution.

> *The amendment in 703(C) undercuts the mitigation offered by the defendant and/or it is a pure appeal to passion.*

Several hypotheticals will illustrate the point. In one case, an elderly man over 70 years old and an owner of a small junkyard in South Phoenix is killed during the course of burglary. His wife of 50 years died earlier in the year, and they have no surviving relatives who would meet the definition of a victim. In another case, an elderly man over 70 years old and an owner of a jewelry store in North Phoenix is killed during a burglary. He is survived by his wife, five children, and 10 grandchildren. He has been active in the community, sponsoring the local little league team and participating in his church both financially and through volunteer work. In each case there are the two aggravating factors of age of the victim and pecuniary gain. In the first case, there is no one to offer impact testimony. In the second, the court hears substantial impact evidence. In both cases, assume the defendant is suffering from a mental illness and/or organic brain damage [similar to the defendants in *State v. Jimenz* and *State v. Stuard*[13]] which the court has found "significantly impaired" the defendant's ability to conform his actions to the requirements of law. The court also finds several nonstatutory mitigating circumstances. How is the court to treat the victim impact information? What weight does it have? Is there a likelihood that you would get a different result in the first case? In the second case, if the court reduces the mitigating effect of the substantial impairment because the court found the emotional and financial impact on the North Phoenix victim was substantial. Clearly in the North Phoenix case, the risk that the court would impose death increases substantially. The mitigating evidence would no longer be "sufficiently substantial to call for leniency." By doing so, the court would then violate the dictates of *Lockett* and *Eddings.* Additionally, the procedure of using victim impact evidence to reduce the weight of a mitigating circumstance has the same impact on the defendant that the refusal to give an instruction had in the *Penry* case. One could only wonder whether the result would be different in *State v. Jimenz* and *State v. Stuard* if the Supreme Court, after considering victim impact evidence, reduced the mitigating impact of the *substantial impairment* suffered by these respective defendants. [The trial judge in both cases originally imposed death.]

From these examples, it seems clear that under the procedure in 703(C), the impact information is a modifier of the court's ability to give proffered mitigating evidence its full effect. It creates a grave risk that the sentence is an unguided response to this highly emotional impact evidence and thus the amendment violates the Eighth and Fourteenth Amendment.

Status of Victim

Recently, there have been a number of tragic shootings of police officers. Does the status of a person, i.e., a police officer F(10), a child under the age of 15 F(9), or an adult over the age of 70 F(9), have any impact? This sets up a situation where the court finds the state has proven an aggravating factor, i.e., the victim was a police officer or the age of the victim, and the court then considers this same victim impact evidence in weighing the proffered mitigating evidence. In effect, it is double counting the same facts. It carries weight as an aggravator and at the same time reduces the weight of a potential mitigator. Under Arizona law, the court may find two aggravating factors based upon the same facts but it can only weigh them once.[14] Is that possible to do under these circumstances?

A second problem is that if impact information can be used as an aggravator and then to reduce the effect of mitigating evidence, we are moving closer to *de facto* mandatory sentencing for certain classes of victims. In *Roberts v. Louisiana*[15] and *Sumner v. Shuman*,[16] the Supreme Court struck down mandatory sentencing in death cases. A review of those cases shows that the major constitutional problem is that it prevents the sentencer from considering mitigating evidence. It is easy to see that if the same facts, first, are the aggravators and then, secondly, the court uses them to reduce the weight of any mitigation offered, it will be in fact impossible to meet the high burden of proof to show that the mitigation is "sufficiently substantial to call for leniency." In *State v. Herrera*,[17] the court found that a combination of factors called for leniency. The victim was a Maricopa County Deputy Sheriff. If the court reduced the mitigating impact of this combination of factors because of the victim impact evidence, the Supreme Court may not have reduced the death sentence to life imprisonment. In *State v. Williams*,[18] Justice Feldman observed the following:

> We have presumed that the trial judges will ignore such testimony, but one must wonder how accurate such an assumption may be. The sentencing decision in many capital cases is difficult enough without subject-

> ing the trial judge to the emotional pressure of listening to the victims understandable, but legally inadmissible recommendations, often motivated by the need for catharsis and sometimes by the desire for revenge.

Responding to Victim Impact

If there are these constitutional problems with victim impact information, then counsel needs to mount a two-prong attack after the jury has returned a guilty verdict. In the past, victim impact information would be contained by a comprehensive motion to seal the presentence report.[19] Generally, trial judges would not review the presentence report [and the letters from the victims attached to the report] until after the court had prepared and read its findings after the 703 hearing. Now one cannot rest upon the old assumptions.

The first prong is an effective pre-hearing motion practice. A

> *In the past, victim impact information would be contained by a comprehensive motion to seal the presentence report.*

motion *in limine* to preclude victim impact evidence should be filed.[20] It should include the constitutional challenges outlined above, but it also must be fact specific if the case involves one of these class offenses, i.e., police officer, etc. A motion to seal the presentence report should still be filed because presentence reports usually contain recommendations from investigating police officers, friends, neighbors, and others who would not meet the statutory definition of a victim.

The next area is discovery. Counsel should insist that the state in its Rule 15(1)(g) disclosure specify whom they are calling for the purpose of establishing this physical, psychological, and financial impact. Counsel should request interviews when they are not prohibited, and copies of any records which support the victim's family's testimony. While counsel may not interview victims, counsel certainly should have access to any counseling records in order to offer rebuttal evidence provided in A.R.S. § 13-703(C).[21]

The second prong is at the hearing itself. Counsel should request the court to establish whether the Rules of Evidence apply, and what burden of proof applies [the defense must prove mitigation by the preponderance of the evidence]. Counsel should object to foundation under Rules 701 and 702 when witnesses attempt to offer "their opinion."

The key objection is relevancy. How is this evidence relevant to mitigation? How does this make a mitigating fact more or less probable? An essential part of this objection is a request that the court perform a Rule 403 analysis. By definition, this evidence is extremely emotional and thereby prejudicial to a defendant; however, as all defense lawyers know, not all harmful evidence will be found to be prejudicial. Under Rule 403, relevant evidence is excluded if its probative value is substantially outweighed by the danger of undue prejudice. Undue prejudice "means an undue tendency to suggest decision on an improper basis."[22] In this context, a decision to impose death is based upon the impact that the death of the victim had upon the surviving family, and thereby disregarding legitimate mitigation in violation of *Lockett* and *Eddings*.

Lastly, counsel should request that the court, in its special verdict, make specific findings on the victim impact and what weight the court gave it – most importantly, whether the court used impact information to reduce the weight of any mitigating factor that was proved by the defense. In *State v. Beaty*,[23] the court strongly suggests that the court make very specific findings on each item of mitigation. One can extend this rationale to the court finding on the impact the court has given to the evidence presented by the victim.

Conclusion

This brings the discussion full circle. Victim impact is unconstitutional because it precludes the court from giving weight to legitimate statutory and nonstatutory mitigation. It reduces the weight, not because it tends to make the mitigation more or less probable, but rather it does so because the victim's death "represents a unique loss to society, and in particular, to his family." As such, it is not relevant to mitigation. It may be too late to believe that victim impact information will not be admitted at the capital sentencing phase; however, we should vigorously challenge the methods used. The defense, under this method, has a dual burden; it must now show that mitigation is sufficiently substantial to call for leniency ***and*** sufficiently substantial to outweigh the psychological, physical and emotional trauma to the victims.[24] In many close cases, the dual burden may be impossible to satisfy.

ENDNOTES

1. 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 702 (1991).
2. 182 Ariz. 290, 896 P.2d 830 (1995)
3. 183 Ariz. 368, 386-387, 904 P.2d 437 (1999)
4. 183 Ariz. at 386
5. A.R.S. § 13-702(C)(9) provides, "The physical, emotional, and financial harm caused to the victim or, if the victim has died as a result of the conduct of the defendant, the emotional and fi-

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nancial harm caused to the victim's immediate family."

6. A.R.S. § 13-702(E) provides, "The court in imposing sentence shall consider the evidence and opinions presented by the victim or the victim's immediate family at any aggravation or mitigation proceeding or in the presentence report.
7. 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)
8. 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)
9. 865 F.2d 1011, 1041 (9th Cir. 1988)
10. 492 U.S. 3021, 109 S.Ct. 2934, 111 L.Ed.2d 511 (1990)
11. 111 S.Ct. at 2608
12. *Lockett*, 98 S.Ct. at 2965; *Eddings*, 102 S.Ct. at 879; and *Perny*, 109 S.Ct. at 2952
13. *State vs. Jimenz*,165 Ariz. 444, 799 P.2d 785 (1990) [victim was a young child] and *State vs. Stuard*, 176 Ariz. 589, 863 P.2d 881 (1993) [victims were three elderly women]
14. *State vs. Marlow*, 165 Ariz. 65, 72, 786 P.2d 395 (1989); *State vs. Tittle*, 147 Ariz. 339, 345, 710 P.2d 449 (1985)
15. 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977)
16. 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987)
17. *State vs. Herrera*, 174 Ariz. 387, 850 P.2d 100 (1993)
18. 183 Ariz. at 386
19. A motion to seal the presentence report is available from the author.
20. A motion *in limine* to preclude the victim impact evidence is available from author.
21. A.R.S. §13-703(C) provides in part, "The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section."
22. *State vs. Schurz*, 176. 46, 859 P.2d 156 (1993)
23. 158 Ariz. 232, 762 P.2d 519(1989). In *State vs. Harrison* 306 Ariz. Ad. Rep. 30 (1999) there is an excellent discussion in a noncapital setting. The same rationale would be equally applicable when the court evaluates [weighs] victim impact evidence.
24. I would like to thank Brent Graham for reviewing the article. Mr. Graham originally developed a similar argument on how A.R.S. § 13-703 (F)(10) was a move back to mandatory sentencing. See *Sumner v.Shuman*, supra.

Make a Note!
New Date

The Office of the Maricopa County Public Defender
and
The City of Phoenix Public Defender's Office

Annual DUI Seminar

Friday February 25, 2000

Set aside time and mark your calendar now to attend this upcoming educational opportunity.

Once again, we will be hosting the DUI Seminar at a theatre complex. This year it will be held at the Arizona Center, Downtown Phoenix.

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BULLETIN BOARD

Attorney Moves/Changes

Brad Bransky, an attorney in our Complex Crimes Unit will be leaving the office effective January 7, 2000 to join the Coconino County Public Defender's Office. Brad has been a trial attorney with our office since 1988. He served as a team leader mentoring younger attorneys, participated in new attorney training and was one of two original members of the Complex Crimes Unit.

Vikki Liles has been selected as the successor to Brad Bransky in our Complex Crimes Unit. Vikki will transition into this role in January sometime following Brad's departure for the Coconino County Public Defender's Office. Vikki brings to this role a great deal of trial experience including considerable work on major felonies, both in this office and in the County Attorney's Office.

Emmet Ronan, our Complex Crime Unit Supervisor will be leaving the office January 11, 2000 to assume a very well deserved appointment as our next Superior Court Judge. Emmet was a trial attorney with our office from 1974–82. He was in private practice from 1982-91, when he rejoined the office. Emmet has served as a trial group supervisor, participated in new attorney training, and was an original member of the Complex Crime Unit. Emmet is a past recipient of the Joe Shaw Award.

Shannon Slattery has been selected for the Legislative Relations Coordinator job. Shannon has had campaign experience and has been involved with the legislative process in Arizona and in the Midwest. In this duty, Shannon will exclusively perform her legislative relations functions during the legislative session, and will resume her trial attorney status during the other months of the year.

Derek Zazueta, a trial attorney in Group C, will serve in a part-time role as our new Community Relations Coordinator for a period of 12 months. Derek was active in community affairs before joining the office. During the next year, Derek will develop an outreach program for speaking at schools and other non-political forums. In addition, Derek will function in certain situations as an ombudsman to assist supervisors in addressing client and family concerns in appropriate case complaint matters.

Support Staff Moves/Changes

Morgan Alexander, will be a new Law Clerk in Group E effective December 27, 1999.

Eva Bowls resigned effective December 14, 1999. Eva was a Legal Secretary for Group D.

James Connelly will be our new Client Services Assistant effective November 29, 1999.

Barbara Jordan will be Group A's new Trainee beginning December 6, 1999.

Diane Kent will be a new Juvenile PD Secretary effective December 13, 1999.

Craig Logsdon will be a new Part-time Defender Law Clerk at Durango Juvenile starting January 3, 2000.

Susan Maga will be a new Law Clerk in Group B beginning December 27, 1999.

Michele Molinario will be arriving at Mesa Juvenile January 4, 2000 as their new part-time Law Clerk.

Sylvia Montoya is the new Office Aide for Appeals effective November 29, 1999.

Cynthia Rodriquez will be arriving on January 3, 2000 as the new Client Services Assistant in Records.

Christina Turner, Office Aide for Group C, resigned effective December 17, 1999.

A Summary of Civil Court Ordered Evaluation and Treatment After Rule 11

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Who Can Be Subject to a Court Ordered Evaluation?

Most prosecutors and criminal defense attorneys are familiar with Rule 11 proceedings as the point of entry into the system of court ordered evaluation and treatment. In practice, few persons ordered for evaluation come from Rule 11 proceedings. Most enter through an emergency process in response to a crisis, many through a non-emergency process, and a small number originate from the Department of Corrections at the expiration of sentence.

How Does the Court Ordered Evaluation Process Begin?

Court ordered evaluation (COE) proceedings begin with an Application for Involuntary Evaluation. Any responsible person can complete an application. This is a departure from earlier Arizona law, as well as the law in many other jurisdictions, in which only a physician, a police officer, or a family member could take this initial step to determine whether a person, called the proposed patient, should become subject to an involuntary evaluation of his mental health status.

The application contains information explaining why the applicant believes the proposed patient is dangerous or disabled due to a mental disorder and why the patient is in need of supervision, care, and treatment. It also contains basic identifying information about the proposed patient. The application is a preprinted form, and assistance is provided to the applicant in its preparation. Applications are signed and notarized. From this point, the process differs depending upon whether the circumstances are routine or an emergency.

Routine Circumstances

In this instance, a matter is referred for a pre-petition screening within 48 hours. Pre-petition screeners are employees of the evaluating agency. Generally they are social workers or nurses, who review the application and interview the applicant to see if the allegations are credible. They interview the proposed patient to assess the problem, explain the application, and, if appropriate, attempt to persuade him to receive evaluation or other services on a voluntary basis. They also determine whether the proposed patient is disabled or dangerous due to a mental illness. The pre-petition screeners may visit the proposed patient at the evaluating agency, or at any other place he can be found. A proposed patient cannot be compelled to participate in pre-petition screening against his will, but his demeanor in refusing may impact upon the final written Pre-Petition Screening Report and its conclusion. The report, along with the application, is forwarded to a medical director of the evaluating agency.

Emergency Circumstances

In an emergency involving dangerousness to self or to another person, a person with actual knowledge of facts supporting the dangerous behavior must complete an Application for Emergency Admission. This application, also on a prescribed form, must state information supporting that the proposed patient is likely, without immediate hospitalization, to suffer serious physical harm or illness or is likely to inflict serious physical harm to another person.

Many times, the proposed patient may come to the evaluating agency with the same persons who apply for the evaluation. If the patient is not at the evaluating agency and the admitting psychiatrist has reasonable cause to believe that an emergency examination of the proposed patient is necessary, the psychiatrist can advise a peace officer that sufficient grounds exist to take the proposed patient into custody and transport him to the evaluating agency. When the proposed patient is so detained, a psychiatrist at the evaluating agency examines the patient.

Finally, the Application for Involuntary Evaluation and either the Application for Emergency Admission or the Pre-Petition Screening Report are reviewed by a medical director at the agency. The director is a psychiatrist or physician. If the medical director determines that no further action is necessary, no legal documents will be filed with the Superior Court. The proposed patient, if detained at an evaluating agency, must be discharged or accepted on a voluntary basis. If the medical director believes that court ordered evaluation is warranted, he will prepare a Petition for Court Ordered Evaluation. This petition will set forth the medical director's belief that the proposed patient, due to a mental disorder, is a danger to self and/or to others, persistently or acutely disabled, or gravely disabled. It contains an explanation of the facts that support his conclusion. The medical director may recommend that court ordered evaluation take place either on an inpatient or an outpatient basis. The assistance of the county attorney can be sought. In cases of alleged dangerousness to others, the county attorney must review the petition and comment whether the allegation does or does not appear to be supported and whether criminal charges should be pursued. The county attorney prepares the Petitions for Court Ordered Evaluations, which originate in Rule 11 criminal competency matters.

The Petition for Court Ordered Evaluation and supporting documents are then filed with the Probate Division of the Superior Court and presented *ex parte* to a hearing officer.

The Petition for Court Ordered Evaluation must be filed within 24 hours of the proposed patient's detention if he is hospitalized pursuant to an Application for Emergency Admission. The hearing officer determines whether the court ordered evaluation will continue. If not, the proposed patient, if an inpatient, must be discharged from the hospital or admitted on a voluntary basis. If the court orders the evaluation, it must consider the proposed patient's level of dangerousness and/or disability, as well as his trustworthiness, when the court's determining whether the evaluation should be conducted on an inpatient or outpatient basis.

Court Ordered Evaluation--Outpatient

When the court orders an outpatient evaluation, the proposed patient is served with a notice of the date, time, and place of the evaluation and copies of the Petition for Court Ordered Evaluation and supporting documents.

The court may order that the proposed patient be detained and hospitalized if he does not submit to or complete the outpatient evaluation. Arizona Revised Statutes do not appear to mandate appointment of counsel for a proposed patient ordered to an outpatient evaluation. But the appointment of counsel is conditionally made, becoming effective if the proposed patient is taken into custody. The evaluation would proceed thereafter as an inpatient evaluation, and the proposed patient is entitled to counsel and rights as referenced below.

Court Ordered Evaluation--Inpatient

When the court orders an inpatient evaluation, the proposed patient remains hospitalized as if they were held pursuant to an Application for Emergency Admission. They are served at the hospital with a detention order and the Petition for Court Ordered Evaluation and supporting documents. If the proposed patient is not hospitalized, law enforcement officers seek him out, serve him with the detention order and the Petition for Court Ordered Evaluation with supporting documents, and deliver him to the evaluating hospital.

When a proposed patient is detained for an inpatient evaluation, the court must appoint counsel. This assures that each person subject to the loss of liberty inherent in the court ordered evaluation process will have access to counsel. It does not preclude the proposed patient from making subsequent arrangements for counsel of choice. If and when the proposed patient is hospitalized, counsel must see him within 24 hours. By statute, counsel must advise the client of their right to request a hearing to determine whether the evaluation should continue on an inpatient basis or simply be stopped. They also must be advised of their right to be represented by counsel at such a hearing, which the court should schedule at its first opportunity. This is the proposed patient's initial access to the court. The court, after an evidentiary hearing, can decide that the proposed patient's evaluation continue, that the proposed patient be released from detention in the hospital but subject to outpatient court ordered evaluation, or that the proceedings be terminated.

What Happens During the Court Ordered Evaluation?

Court ordered evaluation is a multidisciplinary analysis. It is usually performed by at least two licensed psychiatrists or physicians experienced in psychiatry, if no psychiatrists are available. Also involved is a social worker familiar with mental health, human services, community treatment, and placement alternatives. The proposed patient has the right to select one of the psychiatrists or physicians who are involved in the evaluation. The evaluating agency must make reasonable attempts to conduct the evaluation in the proposed patient's language of preference.

A proposed patient may choose to engage in treatment during his evaluation, but he may not be forced to do so against his will. This means that medication cannot be forcibly administered during court ordered evaluation, subject to the qualification that medication can be administered to a proposed patient posing a risk of violence or dangerousness. Similarly, a proposed patient may not be secluded and/or restrained during court ordered evaluation, subject to the same qualifications.

How Does a Court Ordered Evaluation End?

Strict time requirements apply to court ordered evaluation. If the proposed patient is not served, the detention order and the Petition for Court Ordered Evaluation expire in 14 days.

Outpatient evaluation must be concluded within four days, and inpatient evaluation must conclude within 72 hours. Weekends and legal holidays are expressly excluded from calculation of time.

The evaluation agency has three means to conclude a court ordered evaluation:

1. If the psychiatrists determine that further evaluation is not necessary, the proposed patient can be discharged.
2. If the psychiatrists determine that the proposed patient can receive services on a voluntary basis, the treatment agency can change the patient's legal status and dismiss the court ordered evaluation.
3. Finally, if the psychiatrists believe that the proposed patient does have a mental disorder which renders him unwilling or unable to seek and accept treatment for that condition, the evaluating agency can file with the court a Petition for Court Ordered Treatment requesting that the

proposed patient be ordered to receive mental health treatment. The sworn statements of two psychiatrists must be attached to the Petition for Court Ordered Treatment, which is thereafter filed with the court and presented *ex parte* to a hearing officer. After review of the material, the hearing officer can deny the petition, thereby releasing the proposed patient from further evaluation and detention, or set the matter for a hearing in not more than six days from the date of the petition's filing.

What Happens before a Hearing on a Petition for Court Ordered Treatment?

Once the court sets a hearing on the Petition for Court Ordered Treatment (COT), the court must determine the whereabouts of the proposed patient. If the proposed patient is detained, the court will likely order that he remain detained until the time of hearing. If the proposed patient is not in custody, the court may order his detention if it appears he will become dangerous either to himself or to others or if he is unlikely to appear for the hearing. The court must appoint counsel at this time if counsel has not yet been appointed or retained. Once again, the fact of appointment of counsel does not preclude the proposed patient from counsel of choice if he has the means. The proposed patient is served with notice of the hearing and a copy of the Petition for Court Ordered Treatment.

The Proposed Patient's Rights

The proposed patient enjoys a panoply of constitutional and statutory rights in court ordered treatment. Presence in the courtroom, confrontation of adverse witnesses, power to subpoena witnesses and records, decision to testify or to maintain silence--all are available to assure the due process protection of the proposed patient. The rules of evidence and civil procedure apply in the preparation for and conduct of the hearing. The standard of proof is clear and convincing evidence. In addition, the proposed patient is statutorily entitled to have an evaluation by an independent psychiatrist.

The Lawyer's Role

The lawyer for the proposed patient is charged with the duty of zealous representation. He is not charged with representing his client's "best interests," whatever they may be, nor is he a guardian *ad litem*. He is expected to heed the special ethical considerations due the disabled client, as set forth in ER 1.14 of the Arizona Rules of Professional Conduct.

Unlike most other areas of the law, minimal duties of counsel for the proposed patient in court ordered evaluation and court ordered treatment are set forth by statute, and failure to fulfill them is punishable by contempt of court. Counsel must interview the proposed patient within 24 hours of appointment, explain the proposed patient's rights pending the hearing of the Petition for Court Ordered Treatment, the procedures and standards at hearing, and the alternative of voluntary treatment, the request for which is always available to the proposed patient. Additionally, counsel must review the Petitions for Evaluation and Treatment and their supporting documents, the medical records, and the list of alternatives to court ordered treatment, all of which the evaluating agency is required to provide counsel. Finally, counsel must interview the petitioner and the witnesses that the evaluating agency intends to call at the hearing. Counsel must interview the two psychiatrists who prepared the affidavits contained in the Petition for Court Ordered Treatment and the statutorily required witnesses who are not involved in the evaluation process and are "acquainted" with the proposed patient at the time of his mental disorder.

Counsel should also be aware that a proposed patient may be accepted as a voluntary patient or discharged if the evaluating agency determines that either disposition is less restrictive than the proposed court order for treatment. In these instances, the evaluating agency will file for dismissal of the Petition for Court Ordered Treatment.

How is a Hearing on a Petition for Court Ordered Treatment Different from Any Other Hearing?

By and large, it is not. It is more likely to occur in a hospital rather than a courthouse. The court must receive evidence about any medications that the proposed patient has received during the 72 hours prior to the hearing. This requirement reinforces the evaluating agency's duty to see that the proposed patient is not under the influence or effect of medications so as to be impaired in preparation for and participation in the hearing.

What Happens at a Hearing?

The court must be satisfied by clear and convincing evidence that the proposed patient has a *mental disorder*, which is defined as:

> . . . a substantial disorder of the person's emotional processes, thought, cognition or memory. Mental disorder is distinguished from:
> (A) Conditions which are primarily those of drug abuse, alcoholism or mental retardation, unless, in addition to one or more of these conditions, the person has a mental disorder.
> (B) The declining mental abilities that directly accompany impending death.

> (C) Character and personality disorders characterized by lifelong and deeply ingrained antisocial behavior patterns, including sexual behaviors which are abnormal and prohibited by statute unless the behavior results from a mental disorder.
> A.R.S. § 36-501(22).

Even if the court is convinced that the proposed patient has a mental disorder, more evidence is needed before the court can order treatment. The court must also be satisfied by clear and convincing evidence that the proposed patient is, because of the mental disorder, dangerous to self, dangerous to others, gravely disabled, and/or persistently or acutely disabled.

Danger to self (DTS) is defined as:

> (A) Behavior which, as a result of a mental disorder, constitutes a danger of inflicting serious physical harm upon oneself, including attempted suicide or the serious threat thereof, if the threat is such that, when considered in the light of its context and in light of the individual's previous acts, it is substantially supportive of an expectation that the threat will be carried out.
>
> (B) Behavior which, as a result of a mental disorder, will, without hospitalization, result in serious physical harm or serious illness to the person, except that this definition shall not include behavior which establishes only the condition of gravely disabled.
> A.R.S. § 36-501(5).

Danger to others (DTO) must not be, but may reference, conduct that may also be criminal. It means:

> . . . the judgment of a person who has a mental disorder is so impaired that he is unable to understand his need for treatment and as a result of his mental disorder his continued behavior can reasonable be expected, on the basis of competent medical opinion, to result in serious physical harm.
> A.R.S. § 36-501(4).

Gravely disabled (GD) is:

> . . . a condition evidenced by behavior in which a person, as a result of a mental disorder, is likely to come to serious physical harm or serious illness because he is unable to provide for his basic physical needs.
> A.R.S. § 36-501(15).

Finally, *persistent and acute disability* (PAD) the fourth of the standards, one of which must be found before the court can order the proposed patient to treatment, describes:

> . . . a severe mental disorder that meets all the following criteria:
>
> (A) If not treated has a substantial probability of causing the person to suffer or continue to suffer severe and abnormal mental, emotional or physical harm that significantly impairs judgment, reason, behavior or capacity to recognize reality.
>
> (B) Substantially impairs the person's capacity to make an informed decision regarding treatment and this impairment causes the person to be incapable of understanding and expressing an understanding of the advantages and disadvantages of accepting treatment and understanding and expressing an understanding of the alternatives to the particular treatment offered after the advantages, disadvantages and alternatives are explained to that person.
>
> (C) Has a reasonable prospect of being treatable by outpatient, inpatient or combined inpatient and outpatient treatment.
> A.R.S. § 36-501(29).

The final consideration of which the court must be persuaded is that the proposed patient is not able or willing to receive treatment on a voluntary basis.

The evaluating agency bears the burden of proof. It must present clear and convincing evidence consisting of testimony by two persons acquainted with the proposed patient at the time of the alleged mental disorder and by two physicians as to the mental status of the proposed patient.

The proposed patient may or may not present a defense. The usual defenses that a proposed patient may consider include, but are not limited to:

- he does not have a mental disorder,
- he can seek treatment on a voluntary basis, and, if he chooses not to do so, knows and understands the consequences of his decision,
- he is not dangerous to self or others, not gravely disabled, and/or not persistently and acutely disabled, and
- the evaluation agency has not met the burden of proof.

If the court dismisses the Petition for Court Ordered Treatment, the proposed patient, if detained, is released from detention. The proposed patient is not precluded from seeking treatment on a voluntary basis. If the court does order the proposed patient to treatment, the court will order specific terms of the treatment.

How Does Court Ordered Treatment Work?

If the patient is ordered to treatment, the court may order outpatient treatment of up to 365 days and must approve a treatment plan. The treatment may be solely inpatient, solely outpatient, or a combination of inpatient and outpatient treatment.

If combined inpatient and outpatient treatment is ordered, the court determines whether treatment shall begin on an inpatient or an outpatient basis. Inpatient treatment is in a mental health treatment agency; outpatient treatment is community-based treatment at a clinic, generally under the supervision of a psychiatrist and a case manager. The type of treatment must be the least restrictive treatment alternative.

If combined treatment begins on an inpatient basis, the patient remains at the evaluating agency or is transferred to another mental health treatment agency. When the treating physician determines that the patient no longer requires inpatient treatment and is not likely to decompensate if following the prescribed treatment plan, the patient will then be released to outpatient treatment coordinated by the outpatient psychiatrist and case manager.

If combined treatment begins on an outpatient basis, the patient is discharged from any mental health agency in which he was held and is returned to the community. The patient may return to his previous residence or to placement at a level of care his treatment teams believe appropriate. This means that the patient will go home or will be assisted in finding a residence if capable of independent living. If the patient requires assistance with daily living activities or administration of medication, a placement can be made in a structured residential placement, a nursing home, a residence for the developmentally disabled, a substance abuse treatment program, or any such other placement that meets the patient's needs. The patient is required to follow such treatment as the outpatient treatment team recommends. Treatment modalities may include medication, counseling, and/or psychotherapy.

Outpatient treatment lasts as long as the patient needs it. If the patient's condition deteriorates, however, a combined inpatient and outpatient treatment order allows the patient to be hospitalized, with or without his cooperation, upon a showing of cause. Legal action to rehospitalize a patient pursuant to a court order may take place in the ordinary course of events. If this occurs, the court, after considering the *ex parte* motion of the outpatient treatment provider, will direct a peace officer to apprehend the patient and deliver him to an inpatient treatment agency. In an emergency situation, the outpatient treatment provider may present its *ex parte* motion to the court after the fact of the patient's admission to an inpatient setting. The patient is thereafter served with the legal documents and has a right to be heard concerning his hospitalization.

Where Does Inpatient Treatment Take Place?

An important part of assuring that patients are treated in the least restrictive alternative is mandatory local treatment (MLT). Initially, the court must make a determination concerning the least restrictive treatment alternative for inpatient care. It may be the local hospital, which is designed for short-term treatment and is generally closer to the patient's residence, family, and community support system. Because the law favors the least restrictive alternative for inpatient treatment, mandatory local treatment is favored. However, if the Arizona State Hospital has special programs to benefit the patient or the patient is currently being treated at the Arizona State Hospital when they are (again) ordered to treatment, then that is where they will be treated. In fact, a patient determined to have a persistent and acute disability is guaranteed a minimum of 25 days MLT before transfer to the Arizona State Hospital can be considered, unless the Superintendent of the State Hospital agrees to accept the patient. This MLT guarantee of 25 days does not mean that the patient must be an inpatient for 25 days. It does mean that if inpatient hospitalization is necessary, no matter how many admissions it may take, the patient must initially be treated locally.

What Rights Does a Patient Have After Ordered to Treatment?

The patient has a right to an appeal or special action. Although the value of appeal in reviewing trial court decisions and in setting forth application of the law is unquestioned, appeals are generally not of practical use to a patient ordered to treatment. Usually the treatment order expires at or before the time the appeals process is completed.

Every 60 days and at such time a patient is returned to inpatient treatment, a patient is entitled to request a judicial review to determine if changed circumstances warrant change to the court ordered treatment. The treatment team, whether inpatient or outpatient, is responsible to remind the patient of the right to judicial review and to note in the clinical record that the judicial review reminder was given. At judicial review the patient will be examined by a physician selected by his treatment provider and a written report forwarded to the court along with the request for judicial review. Counsel will be appointed. If changed circumstances have occurred, the

court may consider altering or vacating the treatment order entirely. Judicial review can be a means to monitor placement at the least restrictive alternative or to determine whether treatment should continue pursuant to court ordered treatment or on a voluntary basis, if at all.

Patients subject to court ordered treatment also possess administrative grievance and appeal rights within the treatment agencies to which they are assigned.

Patients ordered to treatment do not lose their civil rights. They may vote, drive, marry, contract, and work. The right to possess firearms is limited by federal law and prohibited by the Arizona Criminal Code. Patients ordered to treatment are not determined incompetent or incapacitated.

When Does Court Ordered Treatment End?

Court ordered treatment ends as specified in the Order. The maximum term is 365 days if the treatment is a combined regimen of inpatient and outpatient treatment. The maximum term of any inpatient days is limited to 90 for danger to self, 180 for danger to others and persistent and acute disability, and 365 for gravely disabled. But the court may order any lesser term and any combination of inpatient and outpatient time as long as these limits are not exceeded.

At the conclusion of court ordered treatment based on danger to self, danger to others, and persistent and acute disability, the patient is no longer obligated to continue treatment. However, if the patient's condition warrants, subsequent proceedings for court ordered evaluation can be initiated. Court ordered treatment based upon gravely disabled is subject to an annual review and examination, in which the patient is represented by counsel. Gravely disabled orders may be renewed for successive periods of no longer than 365 days if the patient's condition remains constant.

What About Guardianship?

When the court determines a patient is gravely disabled, the court must order an investigation to find out if the patient needs a legal guardian. A person or agency is appointed by the court (and subject to the court's supervision) to make personal care, treatment, and placement decisions on behalf of the patient. The investigation must also survey the need for a conservator. This can be a person or agency appointed by the court (and also subject to its supervision) to provide management of income and assets for the patient, unless adequate measures to assure the protection of the patient and his resources are already established. If no family or other persons are interested, qualified, and available, the public fiduciary may seek guardianship and conservatorship.

Persons having a legal guardian may not, according to *Pima County Public Fiduciary v. Superior Court*, 26 Ariz.App. 85, 546 P.2d 354 (1976), voluntarily admit themselves for inpatient treatment because the court, in appointing a guardian, has determined that those persons do not have the ability to consent to such treatment. The guardian may also not admit the person under guardianship to an inpatient mental health treatment agency unless a court, after assuring additional due process rights, has granted that authority. See A.R.S. §14-5312.01, new in 1999. If the guardian has this special authority, the ward must remain represented by counsel and has the right to seek a court review of the appropriateness of the inpatient psychiatric admission.

Conclusion

Court ordered evaluation and treatment is a drastic tool, coercive in nature, designed to allow mental health treatment to be administered to those who do not want it or do not have the ability to consent to it voluntarily. The complexity of this civil action is mandated due to the substantive and procedural rights inherent in actions by the state not only to confine against his will an individual not accused of a crime, but also to administer powerful medications, forcibly, if necessary, into that individual's body.

A competent criminal law practitioner should have a working knowledge of civil court ordered evaluation and treatment for allegedly mentally ill persons. It can be a resource for negotiating the resolution of criminal matters, particularly those, which appear to have arisen in large part due to the mental circumstances of the accused. The process of court ordered evaluation and, if warranted, court ordered treatment may also be a means by which the mentally ill offender can be offered alternatives to deter conduct from which future criminal charges could arise.

WINSHIP FINDS SAFE HARBOR IN HAWAII, RUNS AGROUND IN DESERT

By James R. Rummage
Defender Attorney – Appeals

"It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *In re Winship*, 397 U. S. 358, 364, 90 S.Ct. 1068, 1073 (1970).

As discussed in two previous *for the Defense* articles, the reasonable doubt instruction mandated by the Arizona Supreme Court in *State v. Portillo*[1] lowers the state's burden of proof, shifts the burden of proof to the defense, misleads the jury on the concept of proof beyond a reasonable doubt, and generally undermines the notion of proof beyond a reasonable doubt.[2] The *Portillo* instruction was, of course, derived from Instruction 21 of the Federal Judicial Center's PATTERN CRIMINAL JURY INSTRUCTIONS 17-18 (1987). Efforts to convince courts of the shortcomings of both the *Portillo* instruction and the Federal Judicial Center's instruction have been frustrating at best. There is a significant body of federal law, and some state court decisions, which give the stamp of approval to this instruction, in one form or another. Within the last few years there have been a couple of glimmers of hope in other jurisdictions, one in a state court and one in federal court. Recently, however, the Arizona Supreme Court emphatically reaffirmed its commitment to the *Portillo* instruction.

In *State v. Van Adams*,[3] the Arizona Supreme Court was asked to re-evaluate its position on the *Portillo* instruction, in part based on the Hawaii case of *State v. Perez*. As the Court stated, "Appellant asserts that we must specifically address the use of the language 'firmly convinced' in defining 'proof beyond a reasonable doubt,' and consider whether that language improperly reduces the state's burden of proof to 'clear and convincing evidence.'"[4] With no further discussion of the issue, the Court simply concluded, "The trial court based its instruction upon the instruction we adopted in *Portillo*. We have clearly indicated our preference for this instruction, which is based upon the Federal Judicial Center's proposed instruction. The trial court satisfied the requirements we specified in *Portillo* and did not err." This conclusion leaves the impression that efforts to convince Arizona courts of the failings of the *Portillo* instruction will not be received favorably. Nonetheless, an examination of the conclusions of the Hawaii courts and the First Circuit on this point is illuminating, if only as an intellectual exercise.

In October of 1998, the Intermediate Court of Appeals of Hawaii held in *State v. Perez* that a portion of a reasonable doubt instruction that was essentially identical to the second paragraph of the *Portillo* instruction deprives the defendant of due process, and is reversible error.[5] In February of this year, the Supreme Court of Hawaii affirmed that holding.[6] The Supreme Court of Hawaii simply agreed with the Intermediate Court of Appeals that the reasonable doubt instruction was prejudicially misleading, without any further elaboration, essentially adopting the reasoning of the Court of Appeals.[7]

The Hawaii Court of Appeals found fault with three concepts expressed in the reasonable doubt instruction at issue in that case: first, that the jurors are directed to find the defendant not guilty if they "think" there is a "real possibility" that the defendant is not guilty; second, that if the jurors find such a real possibility, they must give the defendant "the benefit of the doubt;" and, third, and most importantly, that proof beyond a reasonable doubt is proof that leaves the jurors "firmly convinced."

In discussing the "real possibility" language, the Hawaii court quoted from the Fourth Circuit case of *United States v. Porter*,[8] which states in part, "Implying the evidence must show a real possibility of innocence to justify acquittal trounces on the principle that a defendant is presumed to be innocent."[9] Citing to the Second Circuit case of *United States v. McBride*, the Hawaii court quoted, "such language . . . may provide a basis for confusion and may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense."[10] As the Hawaii court summed it up, "[A]dvising the jury its verdict of 'not guilty' rests on whether it 'think[s]' there is a 'real possibility' the defendant is not guilty invites the jury to abandon the presumption of innocence."[11] The court does recognize in *Perez* that there are federal courts which have held the other way.[12]

The Hawaii court also concluded that there is no reason to instruct the jury that it must give the defendant "the benefit of the doubt" if there is a real possibility he is not guilty.[13] The court stated, "[A] criminal defendant is unequivocally entitled to an acquittal if the State fails to prove any element of the crime beyond a reasonable doubt, and an instruction should not imply otherwise."[14]

The *Perez* decision saves its strongest criticism for the portion of the reasonable doubt instruction which equates proof beyond a reasonable doubt with being firmly convinced, and it held that portion of the instruction to be reversible error. Again recognizing that there is federal case law to the contrary, the court stated, "[I]n our view, it is possible to be firmly convinced of a fact, yet still retain a reasonable doubt."[15] The court explained that Hawaii law has defined the lesser burden of proof by "clear and convincing evidence" as producing "in the mind of

the trier of fact a firm belief of conviction as to the allegation sought to be established ...."[16] The court concluded, "We believe the term 'firmly convinced' is so like the term 'firm belief of conviction' that is associated in the law with the lesser burden of clear and convincing evidence, as to communicate something less than the highest burden under the law, that of 'beyond a reasonable doubt.'" [17]

The *Perez* court determined that it was not appropriate to consider other instructions given in the case in deciding whether the offending language constituted reversible error.[18] A common refuge for courts when analyzing issues involving a defective reasonable doubt instruction is to conclude that when the instructions are considered as a whole, the objectionable language was not misleading or deficient. Because the portion of the instruction at issue in *Perez* was the actual definition of the prosecution's burden, the Hawaii court declined to take that road in evaluating the "firmly convinced" language. The court also stated, "Moreover, because of its definitional and conclusory function, we are not persuaded that its infirmity is cured by reference to the other instructions as a whole."[19] This reasoning can be applied to the *Portillo* instruction, as well.

The Hawaii court found reversible error in the portion of the reasonable doubt instruction which was derived from the federal pattern instruction. The court noted that the recommended Hawaii instruction on reasonable doubt, HAWJIC 3.02, avoided the problems of the federal instruction. The text of that instruction is set out in an appendix to this article. While it certainly is not perfect, it is worth consideration in drafting an appropriate reasonable doubt instruction.

While there is a significant body of federal case law approving the federal counterpart to the *Portillo* instruction, not all circuits are so enamored. The First Circuit feels so strongly about the problems with the Federal Judicial Center instruction that in July of last year in *United States v. Woodward*,[20] the court felt compelled to raise the issue itself, despite the fact that the defendant did not raise the issue on appeal. Although the court did not reverse the conviction in *Woodward*, it remarked that the primary reason the instruction survived the "high hurdle of plain error review" was "notably because the court gave significant emphasis to the presumption of innocence."[21] The court continued with its criticism of the instruction, remarking, "Nevertheless, we have previously joined other circuits in criticizing the Federal Judicial Center instruction from which the district court's 'firmly convinced' language is drawn. *See United States v. Gibson*, 726 F.2d 869-874 (1st Cir.), *cert. denied*, 466 U.S. 960, 104 S.Ct. 2174, 80 L.Ed.2d 557 (1984) ...."[22] While the *Woodward* decision is not nearly so powerful as the *Perez* decision, since it did not result in reversal, it nonetheless combines with the *Perez* decision to give continued hope that some courts recognize the infirmities of the Federal Judicial Center instruction and the *Portillo* instruction.

APPENDIX

HAWJIC 3.02

You must presume the defendant is innocent of the charges against him. This presumption remains with the defendant throughout the trial of the case, unless and until the prosecution proves the defendant guilty beyond a reasonable doubt.

The presumption of innocence is not a mere slogan but an essential part of the law that is binding upon you. It places upon the prosecution the duty of proving every material element of the offenses charged against the defendant beyond a reasonable doubt.

You must not find the defendant guilty upon mere suspicion or upon evidence which only shows that the defendant is probably guilty. What the law requires before the defendant can be found guilty is not suspicion, not probabilities, but proof of the defendant's guilt beyond a reasonable doubt.

What is reasonable doubt?

It is a doubt in your mind about the defendant's guilt which arises from the evidence presented or from the lack of evidence and which is based upon reason and common sense.

Each of you must decide, individually, whether there is or is not such a doubt in your mind after careful and impartial consideration of the evidence.

Be mindful, however, that a doubt which has no basis in the evidence presented, or the lack or evidence, or reasonable inferences therefrom, or a doubt which is based upon imagination, suspicion or mere speculation or guesswork is not a reasonable doubt.

What is proof beyond a reasonable doubt?

If, after consideration of the evidence and the law, you have a reasonable doubt of the defendant's guilt, then the prosecution has not proved the defendant's guilt beyond a reasonable doubt and it is your duty to find the defendant not guilty.

If, after consideration of the evidence and the law, you do not have a reasonable doubt of the defendant's guilt, then the prosecution has proved the defendant's guilt beyond a reasonable doubt and it is your duty to find the defendant guilty.

(Continued on page 16)

(Continued from page 15)

ENDNOTES

1. 182 Ariz. 592, 898 P.2d 970 (1995).
2. Defining Reasonable Doubt: Is *Winship* Sinking?, *for The Defense*, Vol. 6, Issue 8, August, 1996; When Your *Winship* Is Taking On Water, It's Any *Portillo* In a Storm: Defining Reasonable Doubt C The Sequel, *for the Defense*, Vol. 6, Issue 12, December, 1996.
3. _____ Ariz. ____, 984 P.2d 16 (1999).
4. *Van Adams*, ¶ 29.
5. *State v. Perez*, 90 Haw. 113, 976 P.2d 427 (App., October 28, 1998).
6. *State v. Perez*, 90 Haw. 65, 976 P.2d 379 (February 8, 1999) (affirming in part, reversing in part).
7. *Id*., pp. 1 & 13.
8. *United States v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987).
9. 90 Haw. at 127, 976 P.2d at 441.
10. *Id*., quoting *United States v. McBride*, 786 F.2d 45, 52 (2d Cir. 1986).
11. *Id*.
12. *Id*.
13. 90 Haw. at 128, 976 P.2d at 442.
14. *Id*.
15. *Id*.
16. *Id*. (citation omitted).
17. 90 Haw. at 129, 976 P.2d at 443.
18. *Id*.
19. *Id*.
20. 149 F.3d 46, 69, n.15 (1st Cir. 1998).
21. *Id*.
22. *Id*.

ARIZONA ADVANCE REPORTS

The Arizona Supreme Court and Court of Appeals opinions that have been decided since the last newsletter will be summarized in next month's issue of *for The Defense*.

HAPPY HOLIDAYS

Office of the Maricopa County Public Defender

1999-2000 Employee Satisfaction Surveys

Employee participation in this survey is extremely important. All employees are strongly encouraged to attend one of the scheduled survey sessions. Contact Stacy Schaffer at x68978 to register. Thank you in advance for your participation.

Schedule of Events

Date/Time	Office	Location
01/21/2000 11:30-12:30	Downtown	*Training Room – 1st Floor*
01/24/2000 12:00-1:00	Durango	*Conference Room*
01/25/2000 12:00-1:00	Durango	*Conference Room*
01/26/2000 11:30-12:30	Downtown	*Training Room – 1st Floor*
01/26/2000 12:30-1:30	Downtown	*Training Room – 1st Floor*
01/27/2000 11:30-12:30	SEF	*Conference Room*
01/28/2000 11:30-12:30	Downtown	*Training Room – 1st Floor*
01/28/2000 12:30-1:30	Downtown	*Training Room – 1st Floor*
1/31/2000 1:00-2:00	Group C	*Judges Conference Room*
02/01/2000 12:00-1:00	Group C	*Judges Conference Room*

Confidentiality

Responses to the survey are anonymous. There are no names or demographic characteristics that will permit linking responses to any particular employees. The only identifiers are department and division code numbers.

NOVEMBER 1999
JURY AND BENCH TRIALS

COMPLEX CRIMES – OCTOBER

Dates: Start-Finish	**Attorney** Investigator	Judge	Prosecutor	CR # and Charge(s)	Result:	Bench or Jury Trial
9/29 – 10/14	**Bransky** **Blieden** Kasieta *Linden*	Cole	Martinez	CR96-11343 1 ct. Murder 1/F1D 1 ct. Manslaughter/F2D	Not guilty of 1° murder Guilty of murder F2D and Manslaughter	Jury
10/25 – 10/27	**Bevilacqua** **Billar** Salvato	Martin	Astrowski	CR99-03525 2 ct. sex cond w. mnr/F6 15 ct. mol. of child/F2 DCAC 2 ct.attpt sex cond w. mnr/F3 DCAC 1 ct furnish obsn material to mnr/F4 19 ct sex cond w. mnr/F2 DCAC 36 ct sex exploit. of mnr/F2 DCAC 2 ct sex abuse/F3 DCAC	State dropped all but 17 counts of sexual exploitation of minor Guilty on all 17 counts	Jury

COMPLEX CRIMES – NOVEMBER

OFFICE OF THE LEGAL DEFENDER

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result:	Bench or Jury Trial
9/23 – 11/9	**Ronan** **Peterson** Thomas *Turner*	Kaufman	O'Connor	CR98-13880(B) 4 ct. Child Abuse/F2 DCAC (Failure to Protect)	Guilty of 4 cts. Reckless Child Abuse – F3	Jury
10/18-11/23	**Bransky** **Schmich** Breen *Turner*	Keppel	Manjencich	CR97-92953 3 cts. Sex Abuse over 15/F5N 18 cts. Sex Assault/F2N 5 cts. Kidnapping/F2N 4 cts. Burglary 2 Deg/F3N	Guilty – 28 counts Not Guilty: 1 ct. Attempted Sex Aslt 1 ct. Kidnapping	Jury

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	*Judge*	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
11/18-11/22	**Phillips**	Katz	Lindsay	CR99-08095 POND / F4 PODP / F6	Guilty	Jury

GROUP A

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
11/3-11/9	**S. Rempe** J. Castro *F. Garrison*	Baca	Martinez	CR 99-02900 Murder 1/F1 Agg. Assault/F3	Not Guilty of Murder 1 Guilty of Murder 2 Guilty Agg. Assault	Jury
11/17-11/17	**M. Farney** N. Jones	Galati	Hunt	CR 99-09883 Criminal Damage/F6	Civil Settlement: Case dismissed w/o prejudice	Bench
11/18-11/22	**C. Flores**	Akers	Pittman	CR 99-06732 PODD/F4 PODP/F6	Guilty	Jury
11/30-12/2	**S. Wall**	P. Reinstein	DeVito	CR 99-07007 Threatening & Intimidating/M1 Agg.Assault/F6 Resisting Arrest/F6 Criminal Damage/M2	Threatening & Intimidat-ing-Dismissed Agg. Assault – Dismissed Resisting Arrest – Guilty Crim. Damage - Guilty	Jury

GROUP B

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
11/2-11/4	**Bond** Souther	Gottsfield	Cummings	CR99-03932 Ct.1.Sale of Narcotic Drugs/F2 W/2 Priors	Guilty	Jury
11/3-11/3	**Gray** Erb	Mangum	Hotis	CR99-06875 Ct.1. Criminal Trespass/F6 Ct.2. Resist Arrest/F6	Guilty	Jury
11/3-11/4	**Peterson**	O'Toole	Contreras	CR99-08976 Ct.1. Unlawful Use Vehicle/F6	Guilty	Jury
11/3-11/9	**Taradash** Casanova	Hilliard	Bailey	CR99-06684 Ct.1. Armed Robbery/F2	Guilty	Jury
11/9-11/15	**Walton** *Linden*	O'Toole	Murray	CR99-08241 Ct.2 Armed Robbery/F2 Ct.1. Robbery/F4	Guilty	Jury
11/15-11/16	**Agan**	Hutt	Gadow	CR99-04235 Ct.1 Armed Robbery/F2	Guilty	Jury
11/16-11/16	**Washington**	McVey	Hotis	CR99-10087 POND/F4 PODP/F6	Guilty-Trial held in absen-tia.	Jury
11/15-11/23	**Primack** **Bublik** Munoz	Jarett	Lamm	CR99-07887 Ct.1 Fraudulent Schemes & Artifices/F2 Ct.1. Trafficking in Stolen Property/F3 Ct.1. Forgery/F4	Ct. 1 Fraud Schemes Hung Trafficking Not Guilty Forgery Hung	Jury
11/17-11/18	**LeMoine** Erb	Kaufman	Poster	CR99-05513 Ct.2 Aggravated DUI/F4 Ct.1 Resisting Arrest/F6	Guilty Not Guilty	Jury
11/22-11/22	**McCullough**	Carrillo	Ireland	MCR99-00400A Ct.1 Interference w/ Judicial Proceedings/Cl.1 Mis.	Not Guilty	Bench Trial
11/22-11/23	**Washington**	Hilliard	Hotis	CR99-10087 Ct.1 Burglary/F4 CR99-10088 Ct.1 Burglary/F4 Ct.1 Trafficking in Stolen Property/F3	Guilty-Trial held in absen-tia.	Jury
11/23-11/24	**Agan**	Baca	Cotitta	CR99-12034 Ct.1 Aggravated Assault/F5	Not Guilty	Jury

GROUP C

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	*Judge*	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
11/2/99	**Silva**	Hotham	Flader	CR99-92569 1 Ct. POND, F4N	Guilty with 2 priors	Jury
11/8 -11/10	**Silva**	Aceto	Andersen	CR99-92674 1 Ct. PODD, F4N	Not Guilty	Jury
11/8 -11/12	**Cotto** *Turner*	Barker	Bennink	CR98-94557 1 Ct. Attempted Armed Robbery, F3N 1 Ct. Agg Assault, F3N	Hung Jury	Jury
11/15 -11/17	**Rossi** **Silva** *Rivera*	Aceto	Jennings	CR99-92699 2 Cts. Agg DUI, F4N	Ct. 1 Guilty Ct. 2 Dismissed w/prejudice	Jury
11/16 -11/18	**Shoemaker** Breen	Dairman	Bennink	CR99-93365 1 Ct. POND, F4N 1 Ct. PODP, F6N	Not Guilty	Jury
11/18 -11/22	**Burkhart**	Gottsfield	Holtry	CR99-92526 2 Cts. Agg DUI, F4N	Guilty	Jury
11/22 -11/23	**Murphy**	N. Hall	Gingold	CR99-91174 2 Cts. Agg DUI, F4N	Guilty	Jury

GROUP D

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
10/4-10/6	**Silva** Bradley	Reinstein	Fuller	CR 99-07088 1 Ct. Burglary, F3 1 Ct. Poss. Burglary Tools, F6	Guilty both counts	Jury
10/26-11/1	**Willmott**	Katz	Simpson	CR 99-09007 1 Ct. Disorderly Conduct, F6	Not Guilty	Jury
10/25-11/4	**Ferragut** Kay	Gerst	Cottor	CR 99-01434 1 Ct. Agg. Assault, F3 (9 priors)	Guilty	Jury
10/28-11/15	**Cox & Berko** *Fairchild*	Reinstein	Barry	CR 98-07677A 1 Ct. Murder 1 2 Cts. Agg. Assault, F3	Guilty	Jury
11/8-11/9	**Varcoe** Bradley	Katz	Adelman	CR 99-07052 1 Ct. Agg. Assault, F6	Not Guilty	Bench
11/10/99	**Stazzone**	Katz	Myer	CR 99-01968 1 Ct. Selling Dang. Drugs, F3 2 Cts. Offer to Sell Dang. Drugs, F3	Guilty Ct. 1 and Ct. 2 Ct. 3 under advisement	Bench
11/8-11/15	**Zelms**	Dougherty	Tucker	CR 99-07812 1 Ct. Kidnap, F2 1 Ct. Attpt/Commit Armed Robbery, F3	Guilty	Jury
11/22/99	**Harris**	Gutierrez	Brooks	99-01244MI Assault	Directed Verdict – Not Guilty	Bench
11/8-11/9	**Schaffer**	Reinstein	Clarke	CR 96-01776 1 Ct. Poss. Narcotic Drug, F4 (with priors)	Guilty	Jury

Group E

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	*Judge*	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
10/28-11/2	**Huls**	Jones	Johnson	CR 99-06343 Armed Robbery/F2D w/priors	Not Guilty	Jury
11/1-11/3	**Leyh**	Hall	Alexov	CR 96-01394 Agg. Asslt./F3D	Not Guilty	Jury
11/3-11/4	**Palmisano**	McVey	Craig	CR 99-02944 Agg. Asslt./F4	Guilty	Jury
11/3-11/5	**Ryan**	Jones	Petrowski	CR 99-07819 3 Cts. Sexual Conduct w/ Minor/F6	Not Guilty on 3 cts. Sexual Conduct w/Minor Guilty (2 cts.) of Contributing to Delinquency of a Minor/M1 (lesser offense)	Jury
11/4	**Rock**	Bloom West Phx. J.P.	Reid-Moore	CR 99-01385MI Interfering w/Jud. Proc./M1	Not Guilty	Bench
11/8-11/10	**Pelletier** **Doerfler**	Jones	Worth	CR 99-04814 Prod. Of Marijuana/F5	Not Guilty	Jury
11/9-11/15	**Slattery** **Kent**	Wilkinson	Gadow	CR 99-09789 2 Cts. Sexual Cndt.w/Minor/F6	Guilty both counts	Jury
11/10-11/15	**Roskosz**	Schwartz	Jones	CR 99-06887 Agg. Asslt.//F6	Not Guilty	Jury
11/10-11/17	**Rock**	Baca	Kerchansky	CR 99-06703 2 Cts. Agg. Asslt./F3D Disorderly Conduct/F6	Guilty all counts	Jury
11/15-11/17	**Flynn** Castro	Reinstein	Pierce	CR 99-10116C 4 Cts. SOND/F6 (over threshold)	Guilty all counts	Jury
11/16-11/18	**Porteous**	Wilkinson	Adams	CR 99-12040 Theft. Of Stolen Veh./F3	Guilty	Jury
11/17	**Evans**	Galati	Spencer	CR 99-10097 Unauth Use Means Transp./F6	Dismissed day of Trial	
11/22-11/23	**Roskosz**	Reinstein	Craig	CR 99-09505 Agg. Asslt./F3D (w/1 prior – on prob.)	Guilty	Jury
11/22- 11/23	**Evans**	Jones	Fuller	CR 99-11512 Theft Stln. Vehicle/F3	Not Guilty	Jury
11/29- 11/30	**Evans** Ames	Ballinger	Lamm	CR99-06357 Agg Assault/ F4	Guilty	Jury
11/29-11/30	**Porteous**	Dunevant	Adams	CR 99-11488 Agg. Asslt./F3	Guilty	Jury

The Office of the Maricopa County Public Defender

Presents

The 4th Annual Trials Skills College

March 15, 16 & 17, 2000
A.S.U. College of Law

On March 15, 16 & 17, 2000 the Office of the Maricopa County Public Defender will present their 4th Annual Trial Skills College at the Arizona State University College of Law. This 2½ day intense trial skills college will concentrate on openings, cross examination, impeachment, and objections. The format is a combination of lecture and demonstration followed by small group breakout sessions where participants are video taped and critiqued.

Day One – Focus on Openings
Taught by Katherine James and Alan Blumenfeld of ACT of Communication

Day Two – Focus on Cross Examination
Taught by Terrence MacCarthy from the Federal Public Defender's Office in Chicago

Further information will be distributed at a later date.

for The Defense

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